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Supreme Court of the United States

OCTOBER TERM, 1961 2

No. 4 37

HEWITT-ROBINS INCORPORATED, PETITIONER,

vs.

EASTERN FREIGHT-WAYS, INC.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

PETITION FOR CERTIORARI FILED OCTOBER 11, 1961

CERTIORARI GRANTED JANUARY 8, 1962

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 491

HEWITT ROBINS INCORPORATED, PETITIONER,

vs.

EASTERN FREIGHT-WAYS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

HEWITT-ROBINS INCORPORATED, Plaintiff-Appellant,

—against—

EASTERN FREIGHT-WAYS, INC., Defendant-Appellee.

**On Appeal from the District Court of the United States
for the Southern District of New York**

Civil Case No. 107-319

Appellant's Appendix

[fol. 1]

**DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF NEW YORK**

HEWITT-ROBINS INCORPORATED, Plaintiff,

—against—

EASTERN FREIGHT-WAYS, INC., Defendant.

COMPLAINT—Filed March 6, 1956

Plaintiff, by Harry Teichner, Esq., its attorney, complaining of the defendant, respectfully alleges:

As a First Separate Count:

1. Plaintiff is a corporation incorporated under the laws of the State of New York and defendant is a corporation incorporated under the laws of the State of New Jersey. The action arises under Part II of the Interstate Commerce Act, U. S. Code, Title 49, Sections 301 to 327, inclusive, as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

2. Defendant is a common carrier by motor vehicle which holds itself out to the general public to engage in the transportation by motor vehicle in interstate commerce of property for compensation between points in the State of New York. The transportation which gives rise to the complaint herein was performed in and through the States of New York, New Jersey and Pennsylvania. As such common carrier, the defendant was and is subject to the provisions of the Interstate Commerce Act, Part II, as amended.

[fol. 2] 3. During the period from about January 1, 1953 to about February 1, 1955, plaintiff delivered to the defendant at Buffalo, New York, numerous shipments of upholstering foam rubber pads in cartons, for transportation to New York City, New York, and similar shipments were

delivered to the defendant at New York City, New York, for transportation to Buffalo, New York.

4. The defendant charged and collected from the plaintiff charges for such transportation which were based on the defendant's interstate rates as published in tariffs on file with the Interstate Commerce Commission.

5. During the period in which the aforesaid shipments moved the defendant was authorized to operate between Buffalo, New York, and New York City, New York, over intrastate routes, and the defendant's intrastate rates for the transportation of the aforesaid commodity between said points as published in tariffs on file with the Public Service Commission of the State of New York, were lower than the rates and charges assessed and collected by the defendant from the plaintiff on the transportation of the aforesaid shipments.

6. The aforesaid rates charged and the resulting transportation charges on the aforesaid shipments, and the practice of the defendant in misrouting the shipments by transporting them over the higher-rated interstate route, were unjust and unreasonable in violation of Section 216, Part II, of the Interstate Commerce Act, (U. S. Code, Title 49, Section 316). The reasonable rates should have been not in excess of the aforesaid intrastate rates; and the reasonable practice of the defendant should have been to route the said shipments over the lower-rated intrastate route.

7. By reason of the facts stated in the foregoing paragraphs, the plaintiff has been subjected to misrouting practices on the part of the defendant and to the payments of [fol. 3] rates and charges for transportation which were unjust and unreasonable in violation of Section 216, Part II, of the Interstate Commerce Act, and plaintiff has been injured thereby to its damage in the sum of Ten Thousand (\$10,000.00) Dollars, which amount is equivalent to the difference between the charges exacted by the defendant and paid by the plaintiff and the charges that would have accrued at the just and lawful rates.

8. Upon the commencement of this action the plaintiff will file a formal complaint with the Interstate Com-

merce Commission, alleging the foregoing facts and requesting that an order be made by the Interstate Commerce Commission determining the reasonable and just rates for the transportation of the aforesaid shipments, and plaintiff respectfully requests that the determination of the issues in this action be held in abeyance until the Interstate Commerce Commission shall make its order as aforesaid.

As a Second Separate Count:

9. Plaintiff is a corporation incorporated under the laws of the State of New York and defendant is a corporation incorporated under the laws of the State of New Jersey. The matter in controversy exceeds, exclusive of interest and costs the sum of \$3,000.00.

10. Defendant is a common carrier by motor vehicle which holds itself out to the general public to engage in the transportation by motor vehicle in intrastate commerce of property for compensation between points in the State of New York. As such common carrier, the defendant was and is subject to the provisions of the Public Service Law of the State of New York.

[fol. 4] 11. During the period from about January 1, 1953 to about February 1, 1955, plaintiff delivered to the defendant at Buffalo, New York, numerous shipments of upholstering foam rubber pads in cartons, for transportation to New York City, New York, and similar shipments were delivered to the defendant at New York City, New York, for transportation to Buffalo, New York.

12. During the period in which the aforesaid shipments moved the defendant was authorized to operate between Buffalo, New York, and New York City, New York, over interstate routes through the States of New York, New Jersey and Pennsylvania.

13. The defendant charged and collected from the plaintiff charges for the transportation of the aforesaid shipments which were based on the defendant's interstate rates

as published in tariffs on file with the Interstate Commerce Commission.

14. If the said shipments were transported by the defendant over its intrastate routes, the defendant should have charged and collected rates and charges for such transportation based on tariffs on file with the Public Service Commission of the State of New York, which were lower than the rates and charges assessed and collected by the defendant from the plaintiff.

15. If the said shipments were transported by the defendant over its intrastate routes, the plaintiff has been subjected to the payment of rates and charges for transportation which were, when exacted, greater compensation than the rates and charges specified in the tariffs on file with the Public Service Commission of the State of New York, and in effect at the time, in violation of Section 63-t of the Public Service Law of the State of New York, to the plaintiff's damage in the sum of \$10,000.00, which amount is equivalent to the difference between the charges [fol. 5] exacted by the defendant and paid by the plaintiff and those that would have accrued at the lawfully applicable rates.

Wherefore, plaintiff demands judgment against the defendant in the sum of \$10,000.00, with appropriate interest and costs, including a reasonable attorney's fee.

Harry Teichner, Attorney for Plaintiff.

DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF NEW YORK

[Title omitted].

ANSWER—Filed March 30, 1956

Defendant, by its attorneys Goldman and Drazen, answering the plaintiff's complaint, respectfully shows to this Court and alleges:

As to the First Count:

1. Denies having any knowledge or information thereof sufficient to form a belief as to each and every allegation set forth and contained in paragraph 1 of the Complaint.

[fol. 6] 2. Admits that defendant is a common carrier by motor vehicle and engages in the transportation of property in interstate commerce and, except as specifically admitted herein, denies each and every allegation set forth and contained in paragraph 2 of the Complaint.

3. Admits that between January 1, 1953, and February 1, 1955, the defendant received shipments of property from the plaintiff for transportation between Buffalo, New York, and New York, New York, and except as specifically admitted herein, denies each and every allegation set forth and contained in paragraph 3 of the Complaint.

4. Admits that defendant's charges for transportation of plaintiff's property were based upon the tariffs on file with the Interstate Commerce Commission and, except as specifically admitted herein, denies each and every allegation set forth and contained in paragraph 4 of the Complaint.

5. Admits that the intrastate rate for the transportation of plaintiff's commodities between New York City and Buffalo, if applicable, which defendant denies, would have been lower than the interstate rates and, except as specifically admitted herein, denies each and every allegation set forth and contained in paragraph 5 of the Complaint.

6. Denies each and every allegation set forth and contained in paragraphs 6 and 7 of the Complaint.

As to the Second Count:

7. Denies having any knowledge or information thereof sufficient to form a belief as to each and every allegation set forth and contained in paragraph 9 of the Complaint.

[fol. 7] 8. Admits that the defendant engages in the transportation of property as a common carrier between points situate within the State of New York and, except as spe-

cifically admitted herein, denies each and every allegation set forth and contained in paragraph 10 of the Complaint.

9. Admits that during the period between January 1, 1953, and February 1, 1955, the defendant received property of the plaintiff for transportation between Buffalo, New York, and New York, New York, and except as specifically admitted herein, denies each and every allegation set forth and contained in paragraph 11 of the Complaint.

10. Admits that defendant's charges for transportation of the plaintiff's property were based on the tariffs filed with the Interstate Commerce Commission and, except as specifically admitted herein, denies each and every allegation set forth and contained in paragraph 13 of the Complaint.

11. Denies each and every allegation set forth and contained in paragraphs 14 and 15 of the Complaint herein.

As a First Separate and Distinct Affirmative Defense:

12. That between January 1, 1953, and February 1, 1955, plaintiff delivered various properties and commodities to the defendant for transportation between Buffalo, New York, and New York, New York.

13. That each and every shipment consisted of and constituted a separate, distinct, independent and entire contract of carriage.

[fol. 8] 14. That each such shipment and each such contract of carriage was made pursuant to and under the uniform domestic straight bill of lading.

15. That the plaintiff failed to file any claim or commence any action upon each and every such separate, distinct, independent and entire contract of carriage within the time limited therefor in each such uniform domestic straight bill of lading covering each such shipment.

As a Second Separate and Distinct
Partial Affirmative Defense:

16. Defendant repeats, reiterates and re-alleges each and every allegation set forth and contained in paragraphs 12,

13. and 14. with the same force and effect as if set forth at length herein.

17. That the plaintiff failed to file any claim or commence any action upon some of the said separate, distinct, independent and entire contracts of carriage within the time limited therefor in each such uniform domestic straight bill of lading.

As a Third Separate, Distinct, and
Complete Affirmative Defense:

18. That between January 1, 1953, and February 1, 1955, plaintiff delivered property and commodities to the defendant for transportation between Buffalo, New York, and New York, New York.

19. That at the time of the making of each and every and all of said shipments, it was understood and agreed by and between plaintiff and defendant that each and every and all of said shipments would move via interstate routes and would be charged for in accordance with the tariffs filed with the Interstate Commerce Commission.

[fol. 9] 20. That at the time of the making of each and every and all of said shipments, it was understood and agreed by and between plaintiff and defendant that each such shipment would be transported to, through and by way of the defendant's terminal in New Jersey for the purpose of assembly and/or breakdown and delivery.

21. That at the time of each and every and all of said shipments it was understood and agreed by and between plaintiff and defendant that the defendant could not and would not handle the plaintiff's commodities as intrastate shipments and that it was physically impossible for the defendant to so handle or treat them.

Wherefore the defendant demands judgment against plaintiff dismissing the plaintiff's Complaint with interest, costs and reasonable attorneys' fees.

Goldman and Drazen. By Milton D. Goldman, A
Partner, Attorneys for Defendant, Office and P. O.
Address, 29 Broadway, New York 6, New York.

[fol. 10]

DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF MOTION TO DISMISS COMPLAINT—
December 7, 1959

Sir:

Please Take Notice that upon the annexed affidavit of Daniel M. Shientag, duly sworn to December 7th, 1959, and upon the pleadings herein and the proceedings heretofore had herein, the undersigned will move this Court, at Room 506 of the United States Courthouse, Foley Square, Borough of Manhattan, City and State of New York, on the 28th day of January, 1960, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order under Rules 12-b and 12-c and Rule 56 of the Federal Rules of Civil Procedure, dismissing the plaintiff's complaint and granting judgment to the defendant against the plaintiff on the ground that no justiciable issue is presented upon which any relief may be granted to the plaintiff, and for such other, further and different relief as to the Court may deem just and proper in the circumstances.

Dated New York, N. Y., December 7th, 1959.

Goldman and Drazen, By Jerome Drazen, A Partner,
Attorneys for Defendant.

To: Harry Teichner, Esq., Attorney for Plaintiff.

[fol. 11]

DISTRICT COURT OF THE UNITED STATES

SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF DANIEL M. SHIENTAG, READ IN
SUPPORT OF MOTION

State of New York,
County of New York, ss.:

Daniel M. Shientag, being duly sworn, deposes and says:

1. I am one of the attorneys for the defendant above named and I am fully familiar with the facts and circumstances hereinafter set forth.

2. This affidavit is submitted by me in support of an application by the defendant for an order dismissing the plaintiff's complaint and awarding judgment to the defendant against the plaintiff upon the ground that no justiciable issue is presented by the pleadings herein.

3. The complaint herein contains two counts. The first count alleges that between January 1, 1953, and February 1, 1955, the plaintiff-shipper delivered a series of shipments of foam rubber pads for transportation by the defendant-common carrier from Buffalo, N. Y. to New York City, N. Y. The first count further states that the defendant transported the shipments over an interstate route and charged the plaintiff therefor on the basis of the defendant's filed and published tariffs for such interstate shipment, [fol. 12] whereas the plaintiff alleges said shipments should have been transported over an intrastate route and at the applicable intrastate tariff which was lower than the interstate tariff. The plaintiff further alleges in the said first count that the practice of the defendant in transporting the shipments over the interstate route constituted an unjust and unreasonable practice in violation of Section 216, Part 2, of the Interstate Commerce Act (USCA Title 49, Sec. 316) and that the reasonable rate should not have been in excess of the intrastate rate, and the

reasonable practice should have been to transport the shipments over the intrastate route. Finally, plaintiff states in the first count, that by reason of the defendant's routing practice, it has been subjected to the payment of rates and charges for transportation which were unjust and unreasonable in violation of Section 216, Part 2, of the Interstate Commerce Act, resulting in damages amounting to \$10,000.00.

4. In the second count set forth in plaintiff's complaint, it was alleged that if the shipments were transported over the intrastate route, then the defendant did not collect the proper charges in accordance with the tariff filed with the Public Service Commission of the State of New York. This count is not, however, involved herein for the reason that subsequent proceedings before the Interstate Commerce Commission developed the fact that 352 shipments were involved, and of this number, 350 shipments moved over an interstate route from Buffalo over U. S. Highway 20 to Avon, N. Y., thence over U. S. Highway 15 and N. Y. Highway 17 to Waverly, N. Y., and thence over U. S. Highway 309 to Athens, Pa. and N. Y.-N. J. Highway 17 via Binghamton and Middletown, N. Y. and Paramus, N. J. to the defendant's terminal at Jersey City, N. J., and thence to their destinations in New York City. The remaining two shipments moved from Buffalo to Valatie, N. Y. and from [fol. 13] Staten Island to Albany, N. Y. and clearly present no controversy recognizable in this court. They were, firstly, intrastate shipments and, secondly, do not meet any of the jurisdictional requirements of this court.

5. This application is, accordingly, directed to the first count set forth in the complaint and the 350 shipments involved thereunder which moved between Buffalo, N. Y. and New York City, N. Y. between January 1, 1953 and February 1, 1955, and which form the subject matter of the plaintiff's entire complaint herein.

6. In its complaint and with regard to the first count, the plaintiff stated that it desired that the determination of the issues be held in abeyance until a complaint could be filed before the Interstate Commerce Commission al-

leging the facts set forth in the said first count, and requesting that an order be made by the said Interstate Commerce Commission determining the reasonable and just rate for the transportation of the shipments involved.

7. Thereafter and following proceedings instituted before the Interstate Commerce Commission and on October 9, 1957, a report was made by Division 3 of the Interstate Commerce Commission (one of the Commissioners dissenting) holding that routing the shipments over the interstate route was an unreasonable practice and that the defendant should transport such shipments over an intrastate route and that an order should be entered directing defendant to cease and desist in the future from said practice.

8. On the same date, to wit: October 9, 1957, an order was entered as follows:

"IT IS ORDERED, that the above-named defendant be, and it is hereby, notified and required to cease [fol. 14] and desist, on or before November 27, 1957, and thereafter to abstain, from the violations of the provisions of Section 216 of the Interstate Commerce Act found in the aforesaid report."

9. Thereafter, the defendant commenced an action against the United States of America and the Interstate Commerce Commission in the United States District Court for the District of New Jersey, seeking to set aside the report and order of the Interstate Commerce Commission in the aforesaid proceeding (No. MC-C-1937, *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 302 ICC 173). Said action in the United States District Court for the District of New Jersey is presently pending undecided, and the determination therein is being held in abeyance until the determination of this application.

10. It is submitted that the following facts are not disputed herein:

- a) That between January 1, 1953 and about February 1, 1955, 350 shipments were transported by the de-

defendant as a common carrier for the plaintiff as a shipper;

- b) That said shipments moved from Buffalo to points in New York City over authorized interstate routes;
- c). That the defendant charged and the plaintiff paid the filed and published tariff rates applicable to an interstate shipment over the routes on which the merchandise actually moved.

11. The plaintiff's claim herein arises on its assertion that the charge was unreasonable because there was available, and the defendant should have used, a different route, namely: an intrastate route, which would have resulted in a different and lower rate being charged.

12. On May 18, 1959, the Supreme Court of the United [fol. 15] States decided the cases of *T.I.M.E. Inc. v. United States of America* and *Davidson Transfer & Storage Co. Inc. v. United States of America*. It is the defendant's contention that said decisions are controlling herein and that their effect is to deny the plaintiff any cause of action or right of recovery for reparations for shipments made prior to the date of the original report of the Interstate Commerce Commission, namely: October 9, 1957, for the reason that no such right exists under common law or Part 2 of the Interstate Commerce Act.

13. Parenthetically, it might be noted that subsequent to the commencement by the defendant, as plaintiff, of the action pending in the United States District Court for the District of New Jersey referred to above, the cease and desist provision of the Interstate Commerce Commission's order of October 9, 1957, was struck out, the defendant having equalized its rates for interstate and intrastate carriage for the articles involved between the terminal points concerned, there then being no occasion or desire for any order with respect to future conduct. Attached hereto and marked Exhibit A are copies of the pleadings herein.

14. The effect of and arguments based upon the decision of the Supreme Court of the United States in the *T.I.M.E.*

and *Davidson* cases will be set forth in a memorandum of law being submitted to the Court concurrently herewith.

Wherefore, it is respectfully requested that an order be made and entered herein granting the defendant a judgment dismissing the plaintiff's complaint, and for such other, further and different relief as may seem just and proper to the Court in the circumstances.

Daniel M. Shientag.

(Sworn to on the 7th day of December, 1959.)

[fol. 16]

DISTRICT COURT OF THE UNITED STATES

SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF HARRY TEICHNER, READ IN
OPPOSITION TO MOTION

State of New York,
County of Kings, ss.:

Harry Teichner, being duly sworn, deposes and says:

1. I am the attorney for the plaintiff herein, and I am familiar with the facts and circumstances hereinafter set forth.

2. This affidavit is made by me in opposition to the defendant's motion to dismiss the complaint and for judgment for such dismissal on the alleged ground that no justiciable issue is presented by the pleadings herein.

3. Page 4 of the moving affidavit states that the motion is directed to only the first count of the complaint. Stripped of its allegations of conclusions of law, the first count of the complaint alleges in substance the following facts. Between January 1, 1953 and February 1, 1955 the plaintiff shipper delivered a number of shipments of foam rubber pads to the defendant common carrier for transportation by motor vehicle from Buffalo, N. Y. to New

York City, N. Y. The defendant transported the shipments over an interstate route and charged the plaintiff [fol. 17] therefor on the basis of the defendant's published tariffs, filed with the Interstate Commerce Commission. However, the defendant contemporaneously published tariffs, filed with the Public Service Commission of the State of New York, containing rates for the intrastate transportation of said shipments, which rates were lower than the aforesaid interstate rates. The freight charges based upon the interstate rates exceeded those that would have accrued upon the basis of the intrastate rates by the sum of \$10,000.00, and plaintiff demands judgment therefor. The complaint asks that the determination of the issues in this action be held in abeyance until the decision by the Interstate Commerce Commission upon a complaint to be filed by the plaintiff.

4. A complaint was filed by the plaintiff with the Interstate Commerce Commission setting forth those facts and requesting relief. Thereafter and on October 9, 1957 a report was made by Division 3 of the Interstate Commerce Commission, wherein the Commission made a finding that the cheaper intrastate route should have been used by the defendant in transporting the aforesaid shipments, which had been tendered unrouted to the defendant. The Commission's report appears in 302 I.C.C. Reports 173, and is made a part of this affidavit by reference.

5. Thereafter, the defendant commenced an action against the United States of America and the Interstate Commerce Commission in the United States District Court for the District of New Jersey, seeking to set aside the report and order of the Interstate Commerce Commission in the aforesaid proceeding. The plaintiff herein was not made a party to that suit, which has been tried but is still pending undetermined. After the trial thereof, and on May 18, 1959, the Supreme Court of the United States decided the cases of *T.I.M.E. Inc. v. United States of America* and *Davidson Transfer & Storage Co. Inc. v. United States of America*, 359 U. S. 464. Thereupon, the defendant herein urged in the New Jersey action, that the

Supreme Court decision was decisive of the action pending in the District Court of New Jersey and that the aforesaid report and order of the Commission should be annulled. General Counsel for the Interstate Commerce Commission, representing the Commission in the New Jersey suit, wrote a Supplemental memorandum in the form of a letter to Judge Richard Hartshorne, before whom that case is pending, expressing the views of the Interstate Commerce Commission, that the Supreme Court's aforesaid decision is not controlling in the New Jersey action, nor is it controlling in the instant action in this Court. A copy of said letter, dated July 31, 1959, is annexed hereto and made a part hereof, and is marked "Exhibit 1".

6. The defendant herein is contending on this motion that the aforesaid decision of the Supreme Court is authority for denying the plaintiff herein the relief it seeks. It appears that Judge Hartshorne is holding in abeyance his decision in the New Jersey suit, pending the determination of the instant motion in this Court.

7. A memorandum of law is being submitted to the Court herewith in support of plaintiff's complaint and in opposition to defendant's motion.

8. It is respectfully submitted that the facts in this case are sufficient to constitute a cause of action upon which the plaintiff is entitled to relief.

Wherefore, plaintiff respectfully requests that the motion be denied, and that plaintiff have such other, further and different relief as may be just and proper.

Harry Teichner.

(Sworn to the 23rd day of February, 1960.)

[fol. 19]

EXHIBIT 1 ANNEXED TO FOREGOING AFFIDAVIT

BFT:BAL

INTERSTATE COMMERCE COMMISSION

Office of the General Counsel

WASHINGTON 25, D. C.

July 31, 1959

Honorable Richard Hartshorne
 United States District Court
 Newark 1, New Jersey

Re: *Eastern Freight-Ways, Inc. v. United States*
and Interstate Commerce Commission, C. A. No.
 535-58 (G. C. File No. 1517).

Dear Judge Hartshorne:

The purpose of this letter is to express the views of the Interstate Commerce Commission respecting the effect of *T.I.M.E. Inc. v. U. S.* and *Davidson Transfer & Storage Company, Inc. v. U. S.*, Supreme Court Nos. 68 and 96, decided May 18, 1959, on the above-entitled case. As you have been advised by the Department of Justice, the United States decided against petitioning for rehearing in the *T.I.M.E.* and *Davidson* cases.

In both the *T.I.M.E.* and *Davidson* cases, the motor carriers had refunded under protest the differences between amounts which they had charged the United States as shipper and amounts which the General Accounting Office deemed proper. The motor carriers sued in federal district courts under the Tucker Act (28 U.S.C. § 1346(a) (2)) to recover the refunds. The district courts entered summary judgments in favor of the motor carriers and the United States appealed. On appeal, it was conceded that the rates charged were the applicable rates embodied in tariffs on file with the Commission, but the United [fol. 20] States contended that the rates were unreasonable

and that the issue of reasonableness should be referred to the Commission for determination. The courts of appeals reversed the decisions below with directions that the cases be held in abeyance pending determination by the Commission of the reasonableness of the applicable rates. Upon application by the motor carriers, the Supreme Court granted certiorari.

As stated by the Supreme Court, these cases present in common a single question, namely, "Can a shipper of goods by a certificated motor carrier challenge in post-shipment litigation the reasonableness of the carrier's charges which were made in accordance with the tariff governing the shipment?" There was no question of misrouting in the *T.I.M.E.* and *Davidson* cases. At issue was simply whether there exists a judicially cognizable right of a shipper by motor vehicle to recover on the ground that the legally applicable rate was intrinsically unreasonable, or to interpose such rate unreasonableness in defense of a suit by the carrier to recover the legally applicable rate. In a 5 to 4 decision, the Court answered the above question in the negative, concluding that the Motor Carrier Act itself does not give shippers a cause of action for recovery of allegedly unreasonable past rates, or enable them to assert rate unreasonableness as a defense in carrier suits to recover applicable tariff rates, and that any such common law right did not survive the passage of the Motor Carrier Act.

The suit in the Southern District of New York, in aid of which the Commission made the determination which is before your Honor, was brought by the shipper to recover the difference between the tariff rate over the interstate routes used and the lower tariff rate published to apply over intrastate routes with respect to those unrouted shipments between points in the same state. It is the shipper's contention that the carrier subjected it [fol. 21] to wrongful charges by transporting the shipments at issue over more expensive interstate routes in derogation of the carrier's duty to transport the unrouted shipments over the less expensive intrastate routes in the absence of adequate justification for failure to do so. *Northern*

Pacific Railroad Co. v. Soham, 247 U. S. 477. Thus, the claim is not that the rate charged was intrinsically unreasonable, rather the controversy is over which of two rates, each embodied in published tariffs of the carrier, should have been charged. The *T.P.M.E.* and *Davidson* cases do not purport to deal with the present situation.

Obviously, once a carrier takes possession of a shipment, the shipper has no way to guard against a carrier misrouting his shipment. It would be contrary to all sense of fair play to hold that a shipper is so at the mercy of a carrier that the latter may collect and retain the rate over whatever route it chooses to transport even though it violates its duty to select the cheapest route available to it. Consequently, the courts have recognized the right of shippers to protection from misrouting by the transporting carrier. For example, in *Wooley Transportation Co. v. George Rutledge Co.*, 162 F. 2d 1016 (3d Cir. 1947), the carrier quoted the shipper an intrastate rate for transporting goods between two points in New Jersey. The carrier, however, moved the goods via its interstate route and demanded payment on the basis of its higher interstate route, contending that it was required by the Interstate Commerce Act to observe its interstate rate by the route of movement. In denying recovery by the carrier the Court of Appeals said:

" * * * The contract between the parties was for intrastate carriage of the goods by motor truck between Montclair and Fedricktown, * * * Instead, for its own convenience and because of certain union contracts with its truck drivers, it transported the goods [fol. 22] over a longer interstate route, via Wilmington, Delaware. By such unilateral action, however, it could not convert a lawful contract for intrastate carriage into one for interstate carriage so as to impose upon the defendant shipper liability for a rate higher than it had agreed to pay.

" * * * Here, however, the plaintiff, with the obvious direct intrastate route open to it, took the defendant's goods around Robin Hood's barn in getting them from Montclair to Fedricktown."

CF., *Galveston H. & S. A. Ry. Co. v. Lakes Bros.*, 294 Fed. 968, 971-973 (S. D. Texas, 1923); *Miller v. Davis, Director General of Railroads*, 240 N. W. 743 (Sup. Ct. Iowa, 1932).

While the Commission lacks power to award damages to a shipper by motor carrier, it is abundantly clear that where an administrative question is involved in an action cognizable in court, that issue must be determined by the appropriate administrative agency. Cf., *United States v. Western Pacific R. Co.*, 352 U. S. 59. Whether the existing circumstances justified the carrier in transporting the shipments at issue via the interstate routes instead of the less expensive intrastate routes was properly a matter for initial determination by the Commission. *Northern Pacific Railway Co. v. Solum*, *supra*.

It is apparent that if the suit filed in the Southern District of New York is maintainable, it was necessary and proper that the Commission make the determination it did in order that the suit might proceed to decision. As I have indicated, the *T.I.M.E.* and *Davidson* cases do not require the conclusion that a suit to recover for misrouting is not judicially cognizable. I suggest that, in any event, the question of whether the action in the District Court for the Southern District of New York is judicially cognizable should properly be left to that court.

[fol. 23] It is our view that your Honor may appropriately proceed to decision in the present case on the issues raised by the parties.

Copies of this letter are being sent to all counsel of record.

Very truly yours,

B. FRANKLIN TAYLOR, JR.,
Associate General Counsel.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HEWITT ROBINS INC., Plaintiff,

—against—

EASTERN FREIGHT-WAYS, INC., Defendant.

OPINION OF THE COURT—October 4, 1960

BICKS, District Judge.

Defendant, a New Jersey Corporation, is a common carrier by motor vehicle possessed of operating rights over both intra and interstate routes governed respectively by tariffs filed with the New York Public Service Commission, (hereinafter PSC), and the Interstate Commerce Commission, (hereinafter ICC). From January 1, 1953 to February 1, 1955, plaintiff, a New York Corporation, tendered a number of unrouted shipments to defendant for carriage between Buffalo, New York and New York City. A number of these shipments were carried over interstate routes necessitating the application of the ICC tariffs [fol. 24] rather than the PSC tariffs which would have been applicable had the shipments been wholly intrastate. Alleging that said routing practice was unreasonable, plaintiff commenced this action, premised on Section 216, Part II of the Interstate Commerce Act, 49 U. S. C. A. § 316, to recover the difference between the amount charged as a result of the interstate shipment and that which would have been charged had the shipments been intrastate.

The motion *sub judice* is to dismiss the complaint and grant judgment for the defendant, in that no justiciable issue is here presented upon which relief may be granted. This case presents a single question under the Motor Carrier Act: Can a shipper of goods by motor carrier challenge in post-shipment litigation the unreasonableness of a carrier's practices in selecting inter or intrastate routes for unrouted shipments, and recover reparations if found unreasonable?

As is the case when the reasonableness of rates is attacked, *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 244 U. S. 426 (1906), so here, the ICC has primary jurisdiction to determine the unreasonableness of a routing practice and courts are without authority to make such determination, *Northern Pacific Ry. Co. v. United States*, 247 U. S. 477, 483 (1917); *Ontario Freight Lines Corp. v. United States*, 76 F. Supp. 526 (D. N. J. 1948). * Plain-[fol. 25] tiff apparently realized this since, during the pendency of this action, it initiated proceedings before the ICC to determine the question of reasonableness. The ICC made a determination that the routing practice herein was unreasonable and forbid defendant from pursuing it prospectively. An appeal from this decision is pending in the United States District Court for the District of New Jersey.

The contention by plaintiff that the Motor Carrier Act creates a statutory cause of action with respect to reparations for unreasonable routing practices is without merit. *T.I.M.E. Inc. v. United States*, 359 U. S. 464 (1958). And, though at common law "in the absence of shipping instructions it is ordinarily the duty of the carrier to ship by the cheaper route." * * * "if other conditions are reasonably equal." *Northern Pacific Ry. Co. v. Solum*, *supra*, at 482. the savings clause of the Act, 49 U. S. C. A. § 316(j), does not preserve the right of action arising from a breach of that duty, since the issue of reasonableness is referable to the Commission. *T.I.M.E. Inc. v. United States*, *supra*, at 474, et seq. See also, *Riss & Co. v. Association of American Railroads*, 178 F. Supp. 438, 444-445 (D. C. 1959).

Motion granted. Settle order on notice.

Dated: October 4, 1960.

Alexander Bicks, United States District Judge.

* * * * * the rule which requires such preliminary determination of administrative question by the Commission applies to * * * any practice of the carrier which gives rise to the application of a rate.

The fact that the administrative question presented involves an intrastate as well as interstate route does not prevent the application of the rule, that courts may not be resorted to until the administrative question has been determined by the Commission. It is sufficient if one of the routes is interstate." *Northern Pacific Ry. Co. v. Solum*, *supra*, at 483.

[fol. 26]

DISTRICT COURT OF THE UNITED STATES

SOUTHERN DISTRICT OF NEW YORK

Civil Case No. 107-319

HEWITT-ROBINS INCORPORATED, Plaintiff,

—against—

EASTERN FREIGHT-WAYS, INC., Defendant.

ORDER AND JUDGMENT APPEALED FROM—October 19, 1960

The defendant having moved for an order, pursuant to Rules 12-b and 12-c and Rule 56 of the Federal Rules of Civil Procedure, dismissing the plaintiff's complaint and granting judgment to the defendant against the plaintiff on the ground that no justiciable issue is presented upon which any relief may be granted to the plaintiff, and for such other, further and different relief as the Court may deem just and proper in the circumstances, and said motion having duly come on to be heard before me on the 25th day of February, 1960, and Goldman & Drazen, Esqs., by Daniel M. Shientag, Esq., having appeared in support of the motion for summary judgment, and Harry Teichner, Esq., having appeared in opposition thereto,

Now, on reading and filing the opinion of this Court and the pleadings herein and the defendant's notice of motion dated December 7th, 1959 and the affidavit of Daniel M. Shientag, duly sworn to on the 7th day of December, 1959, submitted in support of defendant's aforesaid motion, and after reading and filing the affidavit of Harry Teichner, Esq., duly sworn to on the 23rd day of February, 1960, together with the exhibit attached thereto, in opposition to the aforesaid motion and due deliberation having been had thereon,

[fol. 27] Now, on reading and filing the opinion of the Court, duly filed on October 5th, 1960, it is on motion of Goldman & Drazen, attorneys for the defendant,

Ordered, that the defendant's motion dismissing the plaintiff's complaint and granting judgment to the defendant pursuant to Rules 12-b and 12-c and Rule 56 of the Federal Rules of Civil Procedure be and the same hereby is granted and the complaint is dismissed.

Dated: Oct. 18, 1960.

Judgment entered 10-19-60.

Herbert A. Charlson, Clerk.

Alexander Bicks, U. S. D. J.

J.A.M. Rec'd in Clerk's Office 10-19-60.

The plaintiff, by its attorney, Harry Teichner, Esq., 66 Court Street, Brooklyn N. Y., hereby waives notice of settlement of the above order.

Harry Teichner, Attorney for Plaintiff.

[fol. 28]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 268—October Term, 1960.

(Argued February 23, 1961)

Docket No. 26685

HEWITT-ROBINS INCORPORATED, Plaintiff-Appellant,

—against—

EASTERN FREIGHT-WAYS, Inc., Defendant-Appellee.

OPINION—July 25, 1961

Before: Hincks and Moore, Circuit Judges, and Brennan, District Judge.*

* Sitting by designation.

Appeal from an order of the United States District Court for the Southern District of New York, Alexander Bicks, *Judge*, and judgment entered thereon, dismissing appellant's complaint pursuant to Rules 12-b, 12-c and Rule 56 of the Federal Rules of Civil Procedure, 187 F. S. 722. *Affirmed*.

[fol. 29] Harry Teichner, Brooklyn 1, New York, for plaintiff-appellant.

Goldman & Drazen, New York, New York (Milton D. Goldman and Wilfred R. Caron on the brief), for defendant-appellee.

BRENNAN, *District Judge*:

The question involved in this litigation requires the application of the provisions of the Interstate Commerce Act (49 U. S. C. 301-327), sometimes known as the Motor Carrier Act, to the facts disclosed in the complaint. The Court below held the complaint to be insufficient under Rules 12-b, 12-c and 56 F. R. C. P. to present a justiciable issue. A brief statement of facts is set out below.

During the period from January 1953 to February 1955, the appellant delivered to the appellee at Buffalo and New York City numerous unrouted shipments of cartons containing foam rubber pads for transportation between the two above cities. The service was performed by the appellee over an interstate route. The freight charges, in accordance with the filed tariff for such route, were paid by appellant who seeks to recover some \$10,000 which represents the excess of said charges over those applicable to an alternate intrastate route.

The appellee, hereinafter referred to as "Eastern," is a certified common carrier by motor vehicle, possessing operating rights between Buffalo and New York City over both interstate and intrastate routes. The applicable rates for the interstate movement were somewhat higher than the rates for the intrastate movement as fixed in the tariffs filed with the Interstate Commerce Commission and the Public Service Commission of the State of New York.

[fol. 30] The complaint alleges specifically that the action "arises under Part II of the Interstate Commerce Act, U. S. Code, Title 49, Sections 301 to 327." It is further alleged therein that the " * * * rates charged * * * and the practice of the defendant in misrouting the shipments * * * were unjust and unreasonable in violation of Section 216, Part II, of the Interstate Commerce Act. (U. S. Code, Title 49, Section 316)." Other allegations are found in the complaint asserting the unreasonableness of the rates charged, all of which are put in issue by the answer. The appellant recognizes the jurisdiction of the Interstate Commerce Commission in the matters referred to in the above allegations. The complaint requests a stay of the determination of the issues involved until the Interstate Commerce Commission could determine "the reasonable and just rates for the transportation of the aforesaid shipments" in a proceeding to be instituted by appellant upon the commencement of the action. It may be stated that such a proceeding was taken and an administrative determination was made holding that Eastern's routing practice, as indicated above, was unreasonable. A cease and desist order to operate prospectively was entered. Such determination is challenged by Eastern in an action to review same. The action is pending in the United States District Court for the District of New Jersey.

Subsequent to the commencement of this action, the Supreme Court handed down the decision reported as *T. I. M. E. Inc. v. United States*, 359 U. S. 464. The lower court relied upon that decision in holding that the complaint, insofar as it is based upon the statute, does not state a claim upon which relief may be granted. The appellant's argument that this action may be distinguished from the holding in the *T. I. M. E.* case, because the later decision involved rates which were intrinsically unreasonable while [fol. 31] here the rates are unreasonable by reason of misrouting, is not persuasive. Under Part 1 of the Interstate Commerce Act, 49 U. S. C. A., § 1, *et seq.*, "Whether the practice of the carrier of shipping over the interstate route was reasonable, when a lower intrastate route was open to it, presents an administrative question. * * * " *North Va.*

Pacific Ry. Co. v. Solum, 247 U. S. 477, 482-483.¹ The same practice when arising under the Motor Carrier Act, §§201, *et seq.*, Part II of Interstate Commerce Act, 49 U. S. C. A. §§301, *et seq.*,² must necessarily be an administrative question. For there is no significant difference of language between the applicable sections of Part I of the Interstate Commerce Act and of the Motor Carrier Act. It follows that the rationale of the *T. I. M. E.* case, pages 472, *et seq.*, is directly applicable here: if, as *T. I. M. E.* holds, under the saving clause of §216(j) of the Motor Carrier Act, 49 U. S. C. A. §316(j), no common law remedy is saved to a [fol. 32] shipper aggrieved by an unreasonable rate, which was an administrative question, no such remedy is saved to a shipper aggrieved by the application of an unreasonable route, which was also an administrative question as held in *Northern Pacific Ry. Co. v. Solum*, *supra*.

Affirmed.

¹ Part 1 of the Interstate Commerce Act, 49 U. S. C. A. §1(5), with respect to carriers by rail provides that "all charges * * * shall be just and reasonable, and every unjust and unreasonable charge * * * is prohibited and declared to be unlawful." 49 U. S. C. A. §1(6) provides that "every unjust and unreasonable * * * practice is prohibited and declared to be unlawful." 49 U. S. C. A. §15(1) provides that whenever " * * * the Commission * * * shall be of opinion * * * that any individual or joint * * * practice whatsoever * * * is or will be unjust or unreasonable * * * the Commission is authorized and empowered to determine * * * what individual * * * practice is or will be just, fair, and reasonable."

² Similarly, the Motor Carrier Act §§216(b) and (d), 49 U. S. C. A. §§316(b) and (d), provides that it "shall be the duty of every common carrier of property by motor vehicle * * * to establish * * * just and reasonable rates * * * and practices * * *" and that all such charges "shall be just and reasonable and every unjust and unreasonable charge * * * is prohibited and declared to be unlawful." And §216(e) of the Motor Carrier Act, 49 U. S. C. A. §316(e), provides that whenever "the Commission shall be of the opinion that any individual * * * rate * * * or practice * * * is or will be unjust and unreasonable * * * it shall determine * * * the lawful rate * * * or the lawful * * * practice."

MOORE, *Circuit Judge* (dissenting):

The merits of the only question now before the court to me seem so clear that it is difficult to conceive of any ground for disagreement. The question is: should plaintiff (appellant) be deprived of an opportunity to place its case before a trial court upon all the facts or, stated in different form, should the doors of the court house be permanently closed to it after a perusal of the pleadings. The doors have been closed by the district court; the majority here now securely bolts them. The only real issue which the complaint submits for determination is the misrouting of plaintiff's shipments. The majority, as did the District Court, bases its decision upon a recent opinion by the Supreme Court in *T. I. M. E. Inc. v. United States*, 359 U. S. 40 (1959) wherein that court in a five-to-four decision held that a shipper of goods by motor carrier, in post-shipment litigation cannot challenge the reasonableness of the carrier's charges which had been made in accordance with filed tariffs governing the shipment.

Unlike the *T. I. M. E.* case, no issue of reasonableness of rates is here presented—in fact, the rates filed are not challenged. The gravamen of the complaint is that defendant carried the goods over the wrong route for which error it should not be charged.

Plaintiff has obtained a ruling from the Commission in an administrative proceeding that the practice was un-[fol. 33] reasonable. However, merely because the word "unreasonable" appears in the *T. I. M. E.* opinion, wherein a recovery for unreasonable rates was denied, does not make it logical to place the decision here upon the reasoning that *T. I. M. E.* held that no common law remedy was saved to a shipper aggrieved by an unreasonable rate, that the determination of "unreasonable rate" was an administrative question; and, therefore, because misrouting was unreasonable and so determined in an administrative proceeding, no common-law remedy was available or preserved by the exceptive provisions of the statute (Section 216(j), 49 U. S. C. 316(j): "Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith."). In my opinion, this is specious syl-

logistic reasoning wherein parallelism is sought to be created by looking only at the words "unreasonable" and "administrative" without analyzing the real basis underlying the result in the *T. I. M. E.* case. The opinions therein of Mr. Justice Harlan for the majority and Mr. Justice Black for the minority four members of the court trace the legislative history carefully and exhaustively. Their respective views are stated with great clarity and, although differing in result on the specific facts with which they were dealing, even the majority opinion does not preclude a decision that on the facts here presented plaintiff would not have a right to be heard in a federal court.

As the Supreme Court pointed out, "the Motor-Carrier Act apparently sought to strike a balance between the interests of the shipper and those of the carrier, and * * * the statute cut significantly into pre-existing rights of the carrier to set his own rates and put them into immediate effect * * *". Thus "under the Act a trucker can raise its rates only on 30 days' prior notice, and the I. C. C. may, on its own initiative or on complaint, suspend the effectiveness [fol. 34] of the proposed rate for an additional seven months while its reasonableness is scrutinized." (*T. I. M. E.*, pp. 479-480.) And as the *T. I. M. E.* decision further notes, this seven-month suspension period is usually ample to permit the adjudication of the rate's reasonableness. The issue in *T. I. M. E.*, therefore, was whether the shipper could recover in a common law action an asserted unreasonable charge when the rate had been previously filed with the Commission after notice to all concerned and had been approved by the Commission to the extent of permitting it to prevail when it could have been suspended. Congress having provided the shipper with such a built-in protection, it was not unreasonable to assume that the shipper's common law right to recover on the theory that the filed rate was unreasonable was implicitly extinguished by the Act. In fact, to allow such a remedy to stand would be inconsistent with and undercut the anticipatory procedures provided.

The situation is vastly different here. As to unreasonable routing practice, no built-in protection for the shipper has been provided. Nor does a shipper have notice that

it will be routed around Robin Hood's Barn until after this has actually occurred. In effect the shipper is in a position similar to that of a shipper who has been charged a rate in excess of the filed tariff. In such a situation even the legislative history referred to in *T. I. M. E.* indicates that such overcharges can still be recovered in a court proceeding.¹ That decision also suggests a distinction both pertinent and applicable here. The shipper in *T. I. M. E.* was relying on certain legislative history to support its view that there existed a common law remedy for

¹ *T. I. M. E.*, footnote 18, pp. 477-478, reads in part:

"It is suggested that Congress was fully informed at the time of passage of the Transportation Act of 1940 of 'an existing interpretation' of the Motor Carrier Act which would allow common-law actions for the recovery of unreasonable rates. We do not so read the legislative history relied upon. On the contrary, Commissioner Eastman, testifying before the Senate Committee, appeared to distinguish between the availability of a judicial remedy in respect of inapplicable tariff rates and the unavailability of such a remedy in respect of rates claimed to be 'unreasonable' though embodied in a filed tariff. The Commissioner said:

"So far as reparation is concerned, there is no reason why these provisions should not be applied to motor carriers as well as to railroads. They were omitted from the Motor Carrier Act only because of the desire to lighten the burdens of the motor carriers in the early stages of regulation, in the absence of any strong indication of public need. Motor carriers have practically no traffic which is noncompetitive, and there is little danger that they will exact exorbitant charges. Since the Motor Carrier Act became effective in 1935, the Commission has not once had occasion to condemn motor-carrier rates as unreasonably high. I don't think we have had any complaints to that effect. It follows that there is nothing to indicate that shippers need provisions to enable the Commission to award reparation for damages suffered because of unreasonable charges."

"The occasion for reparation from motor carriers would chiefly arise, therefore, in the event of overcharges above published tariff rates. Shippers can recover such overcharges in court as the law now stands." (Emphasis added.)

"Hearings before Senate Interstate Commerce Committee on S. 1310, S. 2016, S. 1869, and S. 2009, 76th Cong., 1st Sess., pp. 791-792."

(the recovery of unreasonable rates. In reading this history contrary to the shipper's view, the Court noted Commissioner Eastman's testimony as distinguishing "between the availability of a judicial remedy in respect of inapplicable tariff rates and the unavailability of such a remedy in respect of rates claimed to be 'unreasonable' though embodied in a filed tariff." The former situation seems clearly applicable to this case, since it is claimed by plaintiff, not that the tariff rate itself is unreasonable, but that the application of this rate to the particular shipment was unreasonable.

[fol. 36] The Supreme Court has frequently had occasion to say that interpretations of statutes by agencies charged with their administration are entitled to very great weight." *Fawcett Machine Co. v. United States*, 282 U. S. 375, 378 (1931); *Skillmore v. Swift & Co.*, 323 U. S. 134, 140 (1944). Although it does not reach the status of an agency interpretation, the analysis of the situation now before this court made by the Interstate Commerce Commission, Office of the General Counsel, with respect to the effect of the *T. I. M. E.* case on this case is so accurate that it is entitled, in my opinion, both to respect and to weight.

"Thus, the claim [in the instant case] is not that the rate charged was intrinsically unreasonable, rather the controversy is over which of two rates, each embodied in published tariffs of the carrier, should have been charged. The *T. I. M. E.* and *Davidson* cases do not purport to deal with the present situation.

"Obviously, once a carrier takes possession of a shipment, the shipper has no way to guard against a carrier misrouting his shipment. It would be contrary to all sense of fair play to hold that a shipper is so at the mercy of a carrier that the latter may collect and retain the rate over whatever route it chooses to transport even though it violates its duty to select the cheapest route available to it. Consequently, the courts have recognized the right of shippers to protection from misrouting by the transporting carrier. For example, in *Wooleyan Transportation Co. v. George Rutledge Co.*, 162 F. 2d 1016 (3rd Cir. 1947), the carrier quoted

the shipper an intrastate rate for transporting goods between two points in New Jersey. The carrier, however, moved the goods via its interstate route and demanded payment on the basis of its higher interstate route, contending that it was required by the [fol. 37] Interstate Commerce Act to observe its interstate rate by the route of movement. In denying recovery by the carrier the Court of Appeals said:

"* * * The contract between the parties was for intrastate carriage of the goods by motor truck between Montclair and Pedricktown. * * * Instead, for its own convenience and because of certain union contracts with its truck drivers, it transported the goods over a longer interstate route, via Wilmington, Delaware. By such unilateral action, however, it could not convert a lawful contract for intrastate carriage into one for interstate carriage so as to impose upon the defendant shipper liability for a rate higher than it had agreed to pay."

"* * * Here, however, the plaintiff, with the obvious direct intrastate route open to it, took the defendant's goods around Robin Hood's barn in getting them from Montclair to Pedricktown."

Counsel concludes (as do I) that:

"As I have indicated, the *T. I. M. E.* and *Davidson* cases do not require the conclusion that a suit to recover for misrouting is not judicially cognizable."

As Mr. Justice Black pointed out in his dissent in *T. I. M. E.*:

"There can be no serious doubt that at common law a cause of action existed against carriers who charged unreasonable rates. See *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 436; *Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.*, 284 U. S. 370, 383. Nor can it be questioned that the Motor Carrier Act confirmed the common-law policy against unreasonable rates and in fact expressly made such

rates illegal.² It is also clear that the Act attempted to preserve all pre-existing remedies which did not directly conflict with its aims."

There may be sufficient reasons for denying redress in the courts to shippers for claims that filed rates are unreasonable but it by no means follows that shippers should be deprived of access to the courts for all wrongful acts committed by motor carriers, for example, mishandling, erroneous billing, misrouting, etc.

Such a determination would not prejudice the carrier's defenses such as agreement to the interstate route, payment of the charges with knowledge, acquiescence, estoppel, laches, etc., any or all of which may well defeat plaintiff's claim but at least plaintiff would thus have a determination on the merits and not be left without remedy merely because its complaint mentioned a statutory basis for its asserted claim.

I would reverse.

[fol. 39]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HEWITT-ROBBINS INCORPORATED, Plaintiff-Appellant,

v.

EASTERN FREIGHT-WAYS, Inc., Defendant-Appellee.

JUDGMENT—July 25, 1961

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the Order and Judgment of said District Court be and it hereby is Affirmed.

A. Daniel Fusaro, Clerk.

[fol. 39a] [File endorsement omitted]

[fol. 40] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 41]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed January 8, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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OCT 11 1961

JAMES R. BROWNING, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. **491**

HEWITT-ROBINS INCORPORATED,

Petitioner,

—v.—

EASTERN FREIGHT-WAYS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

HARRY TEICHNER,
66 Court Street,
Brooklyn 1, New York.
Attorney for Petitioner.